U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 27 April 2007

Case No.: 2006-LDA-00063

OWCP No.: 02-139987

In the Matter of:

J.M.,[1]
Claimant,

v.

SERVICE EMPLOYERS INTERNATIONAL, INC.,
Employer,

and

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, c/o AIG WORLDSOURCE,
Carrier,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest.

APPEARANCES:

John M. Schwartz, Esq.
For the claimant

Grover E. Asmus, Esq.
For the employer/carrier

BEFORE: DONALD W. MOSSER
Administrative Law Judge

[1] In any Decision and Order issued by the U.S. Department of Labor in Longshore cases after August 1, 2006, the claimant is referred to only by initials rather than by full name in the interest of protecting their privacy.

DECISION AND ORDER

This proceeding arises from a claim for workers' compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.*, hereinafter referred to an the Act, and as extended by the Defense Base Act, 42 U.S.C. § 1651, *et seq*. This case was referred to the Office of Administrative Law Judges on March 22, 2006. (ALJX 1).

Following proper notice to all parties, a formal hearing was held on August 15, 2006 in Evansville, Indiana. Exhibits of the parties were admitted in evidence at the hearing pursuant to 20 C.F.R. § 702.338, and the parties were afforded the opportunity to present testimonial evidence and to submit post-hearing briefs.

The findings of fact and conclusions of law set forth in this decision are based on my analysis of the entire record. Each exhibit and argument of the parties, although perhaps not mentioned specifically, has been carefully reviewed and thoughtfully considered. References to ALJX, CX, and EX pertain to the exhibits of the administrative law judge, claimant, and employer/carrier, respectively. The transcript of the hearing is cited as Tr. and by page number.

ISSUES

I find the following matters remain for resolution[2]:

1. whether the claimant's job-related accident caused his disabling back condition;

2. the nature and extent of the claimant's disability resulting from his work-related injuries;

3. whether the claimant needs surgery and, if so, whether such was necessitated by a pre-existing condition;

4. the amount of the claimant's average weekly wage for purposes of computing compensation; and,

5. whether interest and attorney fees should be assessed against the employer/carrier.

(Tr. 14).

[2] Claimant, through counsel, moved at the formal hearing that matters requested by claimant in requests for admissions be deemed admitted because of the employer/carrier's failure to adequately comply with the claimant's discovery requests. I reserved my ruling on the motion until the parties' counsel could address the matter in their briefs. Claimant did not mention this procedural issue in his brief and did not raise the motion more than ten days prior to the hearing as required in my pre-hearing order. I therefore find the claimant has waived his position with respect to this procedural issue. I further find that counsel for the employer/carrier has shown in his brief on this issue that the employer reasonably complied with the discovery requests of the claimant. Claimant's request that matters raised in the claimant's request for admissions be deemed admitted is denied.

FINDINGS OF FACT

The claimant is a fifty-two year old male who has been employed as a concrete finisher for most of his adult life. (Tr. 47). He completed the eighth grade and later obtained a GED. (Tr. 22). On September 23, 2004, the claimant signed an "Employment Agreement" with the employer, Service Employers International, Inc. (EX 2, p. 25; Tr. 71-72). Pursuant to the agreement, the claimant was to work as a concrete finisher in Afghanistan for twelve months.

Before being shipped to Afghanistan, the claimant underwent a "comprehensive physical" at the request of the employer. (Tr. 34). As one of the requirements of the physical, the claimant completed a questionnaire indicating his prior medical problems. The claimant disclosed that he had injured his back in 1998, but that the injury did not require surgery, and that he had a history of back pain. (EX 3, p. 3). The claimant testified that his back was examined by the examining physician. (Tr. 34). The physician opined that the claimant was qualified for the position and could be assigned any work consistent with his skills and training. (EX 3, p. 11).

On October 15, 2004, claimant arrived at his work location in Afghanistan. While there, his job duties included building forms, tying rebar, and pouring and finishing concrete. (Tr. 36). He described this work as "very hard, physically demanding work." (Tr. 25). Initially, the claimant performed his job duties without any difficulty and he worked a minimum of eighty-four hours per week with no reports of back pain. (Tr. 36). However, the claimant was injured on the job after about four months of employment. Although the claimant could not remember the exact date of his accident, the parties stipulated to January 28, 2005 as the date of the injury. (Tr. 23-25). Claimant stated that his back began hurting one night after he was required to do extensive shoveling and lifting for five hours "as hard and fast as we could possibly go" in order to protect the compound from a massive rainstorm. (Tr. 25). According to the claimant, his back began to cause him problems immediately after this incident and it continued to worsen until it got to the point that the claimant "couldn't hardly walk at all." (Tr. 25-26). On January 28, 2005, the claimant reported to the Camp Medic that he was experiencing back pain and he provided a handwritten statement indicating that he had an old fracture to his sacrum that would flare up "every great once in a while." (EX 4, p. 6). He also reported his back pain to his foreman and he was allotted a lighter duty position driving a delivery truck. (Tr. 26). Eventually, it was determined that the claimant should be sent back to the United States for evaluation and treatment of his back problems. (EX 4, p. 8; Tr. 26-27).

The claimant returned to his home in February of 2005 and saw his personal physician, Dr. James Roher. (Tr. 28). In his medical records, Dr. Roher noted that the claimant had a longstanding history of back problems and recommended a neurological evaluation and an MRI study. He opined that the claimant was "unable to work at this time until his problems are cured." He prescribed anti-inflammatories, muscle relaxants, and physical therapy. (EX 5). Dr. Matthew L. Powers, on February 26, 2005, the conducted a lumbar MRI, from which he concluded that the claimant's back demonstrated an "excreted disc herniation" at the L4-L5 level. (EX 6).

Claimant was seen on March 10, 2005, by Dr. Manuel Cacdac. The physician examined the claimant and reviewed x-rays and an MRI from the mid-1990s. He had another MRI and EMG conducted which showed multiple level degenerative discs, but no evidence of a disc rupture or extrusion. He also noted that the claimant was disabled from work due to these symptoms. In Dr. Cacdac's opinion, the claimant had a pre-existing condition that was aggravated in the "accident of January 28, 2005." (CX 6; EX 7). Dr. Cacdac recommended an epidural injection instead of surgery. (Tr. 29; EX 7).

The claimant received the epidural injection, which was paid for by the employer's insurance company. (Tr. 29). Claimant testified that the injection only provided relief "for a short time." (Tr. 30). On May 24, 2005, the claimant saw Dr. Cacdac again. At this visit, the Dr. Cacdac opined that the claimant had reached maximum medical improvement and that he could work but could not do any heavy lifting. (EX 19). Claimant stated that he subsequently called Dr. Cacdac's office to schedule an appointment because his back pain had returned despite the epidural injection, but was refused further treatment. (EX 19).

Dr. Rohrer referred the claimant to a neurosurgeon, Dr. Matthew Kern. (Tr. 30). Dr. Kern examined the claimant on June 17, 2005 and found mildly degenerative disc at L4-5. He attributed the claimant's problems to a pre-existing back condition aggravated by his duties with the employer for which the physician recommended surgery. (CX 1, CX 8, p. 6, 7). Based on this examination and the claimant's complaints that the epidural injections and physical therapy had not helped in the past, Dr. Kern recommended that the claimant undergo a fusion on his abnormal disc. (CX 1; EX 10). The claimant testified that he would like to have the surgery, but the employer's insurance company has refused to authorize it. (Tr. 31).

In light of the differing medical opinions regarding the necessity of surgery, the employer/carrier forwarded the claimant's medical records to Dr. William E. Blair, an orthopedic surgeon, for review and evaluation. Dr. Blair provided a medical report dated September 27, 2005. (EX 11). The physician disagreed with Dr. Kern and opined that surgery was not necessary. He stated that the claimant's work-related injury was nothing more than a flare-up of the claimant's chronic episodic low back pain. (EX 11). Dr. Blair found nothing in the claimant's medical records that would support the conclusion that the claimant needed surgery as a result of the work-related incident. (EX 11, p. 6).

At the request of the carrier, the claimant was seen on November 8, 2005 by Dr. Robert Huler for an independent records review. (EX 12). Dr. Huler reviewed the miner's most recent MRI taken February 26, 2005, and he opined that it reflected a disc herniation. (EX 12, p. 1-3). The physician's recommendation was that surgery "remains an option" and the claimant could be referred to a specialist for consideration of "right-sided lumbar 4-5 diskectomy." (EX 12, p. 6). In addition to several other medical records, Dr. Huler also reviewed an MRI of claimant dated November 14, 1994. He compared the 1994 MRI to the most recent MRI and found that the diagnosis of lumbar degenerative disc disease predated the claimant's employment in Afghanistan and was present "as long ago as 1994." (EX 12, pp. 10-11).

Claimant testified that he has a history of back injuries. (Tr. 32). He stated that his first injury occurred in 1983 when he fell and fractured his pelvis. (Tr. 47). He was off work for eight and a half months. (Tr. 48). In 1986, the claimant was crushed between the hinge of a truck door and a gate. (Tr. 48). Claimant could not recall whether he was told he had a herniated or a bulging disc in his back due to this accident. (Tr. 49). In 1994, claimant injured his sacrum while slinging a sledgehammer and was off work "almost three years" (Tr. 52).

On February 4, 1998, the claimant fell off a scaffold and hurt his back. (Tr. 53). He filed a worker's compensation claim, and in connection with this claim was seen by Dr. Richard Stein. (EX 13-F). This physician opined that the claimant had reached maximum medical improvement on September 16, 1998, with sixteen percent impairment to the body as a whole. (EX 13-F, pp. 28-29). In addition, Dr. Stein noted that the claimant should not lift over fifteen pounds. *Id.*

Claimant testified that he recovered fully from all of these injuries before he returned to work. He stated that he had no "major problems" with his back between the time that he recovered from his 1998 accident and the time that he went to work in Afghanistan in 2004. (Tr. 59). However, the record indicates that the claimant was treated at the Veterans Memorial Hospital ("VA") on at least two occasions between 1998 and 2004 when he left for Afghanistan. In June of 2003, he visited the VA complaining of low back pain. (EX 13-I, p. 24). He again visited the VA in November of 2003 for a follow-up of chronic conditions, mostly relating to his back, but had no new complaints of pain or injuries. (EX 13-I, p. 13).

According to the claimant, he was actively working from 1999 to the time he left for Afghanistan. (Tr. 64–65). The only evidence in the record that supports this testimony are earnings records from one employer. (Tr. 63; EX 15). Claimant earned five-hundred dollars working for this company in calendar year 2004. (Tr. 63; EX 15). Claimant does not have any tax or earnings records of any other employment since 1998. According to claimant, he worked little jobs or side jobs "here and there." (Tr. 60).

Claimant was of the opinion that his earnings from the employer while in Afghanistan would amount to about $82,000.00 a year. (Tr. 38). His employment agreement with Service Employers International provided for a monthly rate of $2,583.00, plus additional compensation referred to as "uplifts" for "foreign service" (5%), "area differential" (25%), and "danger pay" (25%). (CX 3; EX 2, 25). The contract also provided that the claimant's monthly salary was paid on the basis of a minimum 40-hour work week. It also provided that if the claimant was placed on standby status, he would be paid the base salary on the basis of eight hours per day, not to exceed 40 hours per week standby pay. Holiday pay under the contract also was to be on straight time. The contract also provided for six weeks of interim leave (R&R) for the year of employment, during which the claimant would be paid straight time (no uplifts). The interim leave, according to the contract, could not be accrued but would "either be observed or forfeited." (CX 3; EX 2-25).

Between October of 2004 and March of 2005, the claimant received a total of $23,637.26 in compensation from the employer. (CX 4, 9; EX 14). Employer began paying benefits under the Act on April 18, 2005, based on a compensation rate of $302.27 per week. This amount was

determined using claimant's earnings from the employer coupled with his $500.00 in earnings from another company in the 52-week period preceding the date that he was injured. (CX 7).

The claim involved in this proceeding was filed on October 11, 2005 and it was controverted by the employer/carrier on October 26, 2005. (EX 1, pp. 5-6).

CONCLUSIONS OF LAW

Causation of Injury

Claimant contends that he aggravated a prior injury to his back while working for the employer on January 28, 2005. (CX B). The employer contends that the claimant did not sustain a permanent injury as a result of his employment and that claimant's back problems are pre-existing and longstanding. (EX 1, p. 27).

Section 2(2) of the Act defines "injury" as an "accidental injury or death arising out of and in the course of employment." 33 U.S.C. § 902(2). The claimant must establish a *prima facie* case that he has suffered an injury. To do so, he must prove that he sustained physical harm or pain and that an accident occurred or working conditions existed that could have caused the harm in the course of employment. *Kier v. Bethlehem Steel Corp.,* 16 BRBS 128 (1984). If a claimant establishes a *prima facie* case of injury, he is aided by a presumption pursuant to Section 20(a) of the Act that the "injury arose out of an in the course of employment." *Kelaita v. Triple A Machine Shop,* 13 BRBS 326, 330-331 (1981).

The employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with, or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. *Kooley v. Marine Indus. N.W.*, 22 BRBS 142 (1989). Thus, if the disability results from the natural progression of an injury, and would have occurred notwithstanding the presence of a second injury, liability for the disability must be assumed by the employer or carrier for which the claimant was working when he was first injured; however, if the second injury aggravates the claimant's prior injury, thus further disabling claimant, the second injury is the compensable injury, and liability therefore must be assumed by the employer or carrier for whom claimant was working when "reinjured." *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45 (CRT) (5th Cir. 1986) (en banc), *aff'g* 15 BRBS 386 (1983); *Abbott v. Dillingham Marine & Mfg. Co.,* 14 BRBS 453 (1981). Unlike occupational disease, which requires a harm particular to employment, a traumatic injury case may be based on job duties that merely require lifting and moving heavy materials. *Quinones v. H.B. Zachery. Inc.,* 32 BRBS 6, 7 (2000).

As detailed above, Section 20(a) of the Act provides claimant with a presumption that the disabling condition is causally related to employment, if it is shown that the claimant suffered a harm and that employment conditions existed or a work accident occurred which could have caused, aggravated, or accelerated the condition. Once the claimant has invoked the presumption, the burden shifts to the employer to rebut the presumption with specific and comprehensive medical evidence severing the connection between such harm and the claimant's employment.

See James v. Pate Stevedoring Co., 22 BRBS 271 (1989). If the presumption is rebutted, the judge must weigh all the evidence and render a decision supported by substantial evidence. *See Del Vecchio v. Bowers*, 296 U.S. 280 (1935). It is well-settled that the judge, in arriving at a decision, is entitled to determine the credibility of the witnesses, to weigh the evidence, and draw inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459 (1968); *Scott v. Tug Mate, Inc*., 22 BRBS 164, 165, 167 (1989).

The medical evidence and testimony is this case clearly establishes that claimant suffered an injury to his back in late January of 2005 during the course of his employment. The claimant had no documented complaints of back pain or "flare-ups" for at least one year before he departed to Afghanistan. (Tr. 59; EX 13-I). Before he began his work with the employer, the claimant passed a physical exam and no mention was made during this exam of back pain or inability to perform manual labor. The claimant worked for over three months in Afghanistan performing demanding activities for very long hours with no evidence of complaints or difficulty performing his duties. In late January of 2005, he was involved in very strenuous work preparing the compound for a rainstorm, after which he developed back problems. These strenuous working conditions could have easily caused harm to an employee's back in the course of his employment. Therefore, I find the claimant has established a *prima facie* case and is entitled to the presumption that his disabling condition is causally related to his work with the named employer.

I also find the employer has not submitted sufficient evidence to rebut the presumption that the claimant's disability was caused by his employment with that company. Claimant was examined by three physicians, and an additional physician reviewed the claimant's records and submitted a narrative report based on his findings. Of the three physicians that examined the claimant, two of these physicians, Drs. Kern and Cacdac, specifically found that the miner aggravated a pre-existing back injury due to his employment with the employer. (CX 8, EX 19).

The third examining physician, Dr. Huler, did not provide a definite opinion pertaining to the causation of claimant's injuries. After examining the claimant on November 8, 2005, he opined that the only issue was whether or not the claimant's disk herniation seen on the most recent MRI was present on any of the previous MRI scans. According to Dr. Huler, if the claimant's disk herniation was new, then "compensability would be required for the treatment of the disk herniation." (EX 12, p. 3). Subsequently, Dr. Huler was forwarded some of the claimant's previous MRIs. After reviewing the older MRIs, Dr. Huler found evidence of lumbar degenerative disk disease, but made no mention of disk herniation. Based on Dr. Huler's earlier statements, this would indicate that the claimant's disk herniation is a compensable injury, but the physician did not give a definite opinion.

The only physician that clearly opined that the miner did not suffer a compensable injury while working in Afghanistan is Dr. Blair. This physician did not examine the claimant. He provided a narrative report based on a review of the claimant's medical records. (EX 11). He opined that the claimant's injuries are no more than a flare up of claimant's chronic episodic low back pain. (EX 11, p. 2).

In further support of its argument that the claimant's back problems are preexisting, the employers refers to the claimant's 1998 medical records from Dr. Richard Stein. Employer contends that Dr. Stein diagnosed the claimant with a herniated disc at L4-5 based on a 1998 MRI. This is the same disc the claimant argues was herniated during the course of his employment in Afghanistan. Employer asserts that this proves that there has been no compensable injury since the claimant's disc was previously herniated and the injury in Afghanistan was just a recurrence of the previous injury, not an aggravation or new injury. I find the employer's argument unpersuasive. Although it is true that Dr. Stein diagnosed the miner with a herniated disc at L4-5 in September of 1998, in November of that same year he completed a physician's medical examination report and diagnosed the claimant with a "bulging disc" at L4-5. (EX 13-F). He also mentions "bulging" and not "herniated" discs in several of his other medical records of the claimant. His opinion appears to be contradictory. Therefore, I find that Dr. Stein's opinion is not sufficient to rebut the presumption and sever the connection between the claimant's injury and his employment in Afghanistan, especially in light of the contrary medical opinions.

In conclusion, I find that the claimant has established a *prima facie* case and is entitled to the presumption that his disability is related to his employment with the employer. The record consists of two strong medical opinions by well qualified physicians relating the claimant's disability to his employment. These physicians had the opportunity to examine the claimant and I lend great weight to their medical opinions. The record indicates that the miner suffers from a herniated disc at the L4-5 level, and MRIs taken of the claimant before his employment with the employer do no reflect evidence of the L4-5 disc herniation. This indicates that the claimant's disc was herniated while working for this employer. This disc herniation is an aggravation of a pre-existing injury.

This conclusion contradicts that of Dr. Blair; however, I grant less weight to his opinion because he has not had the opportunity to examine the claimant. Dr. Huler's medical opinion is vague and indecisive and is not sufficient to rebut the presumption. Furthermore, the employer improperly places weight on the contradictory opinion of Dr. Stein. Based on my review of these records, I find that the employer has not produced specific and comprehensive medical evidence to rebut the presumption that the claimant's injuries were aggravated during the course of his employment.

Nature and Extent of Disability

The claimant contends that he has not reached a point of maximum medical improvement and he seeks temporary total disability benefits under Section 8(b) of the Act from his date of injury and continuing. (CX B). As I noted above, the evidence establishes that the claimant sustained injuries, as defined under the Act, to his back arising from employment with Service Employers International, Inc. Therefore, the primary issue remaining for resolution is the nature and extent of any disability that is caused by his injuries.

Under the Act, "disability" is defined as the "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or other employment." 33 U.S.C. § 902(10). Generally, disability is addressed in terms of its extent, total or partial, and its

nature, permanent or temporary. A claimant bears the burden of establishing both the nature and extent of his disability. *Eckley v. Fibrex and Shipping Co.,* 21 BRBS 120, 122 (1988); *Trask v. Lockheed Shipbuilding and Construction Co.,* 17 BRBS 56, 59 (1985).

The extent of disability is an economic concept. *See New Orleans (Gulfwide) Stevedores v. Turner,* 661 F.2d 1031, 1038 (5th Cir. 1981); *Quick v. Martin,* 397 F.2d 644, 648 (D.C. Cir. 1968). Thus, in order for a claimant to receive an award of compensation, the evidence must establish that the injury resulted in a loss of wage earning capacity. *See Fleetwood v. Newport News Shipbuilding and Dry Dock Co.,* 776 F.2d 1225, 1229 (4th Cir. 1985). To establish a *prima facie* case of total disability, the claimant must show that he cannot return to his regular or usual employment due to his work-related injury. "Usual" employment is the claimant's regular duties at the time that he was injured. Hence, even if he only did the latest duties for four months, those duties, and not his prior job, are his "usual" employment. *Ramirez v. Vessel Jeanne Lou, Inc.,* 14 BRBS 689 (1982).

If the physician recommends surgery and light-duty work and the claimant experiences pain while performing many activities, the claimant has made a *prima facie* showing of total disability. *Carter v. General Elevator Co.*, 14 BRBS 90 (1981). *See Offshore Food Serv. v. Murillo*, 1 BRBS 9 (1974). The claimant's credible complaints of pain alone may be enough to meet his burden. *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Richardson v. Safeway Stores*, 14 BRBS 855 (1982). If the claimant makes this *prima facie* showing, the burden shifts to employer to show suitable alternative employment. *Clophus v. Amoco Prod. Co.*, 21 BRBS 261 (1988); *Nguyen v. Ebbtide Fabricators*, 19 BRBS 142 (1986). A failure to prove suitable alternative employment results in a finding of total disability. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989).

I find that claimant has established a *prima facie* case of total disability since the date of his injury, January 28, 2005. The claimant complained of severe back pain during his testimony. (Tr. 21). Furthermore, both Drs. Kern and Rohrer opined that the claimant is unable to return to work as a laborer, and Dr. Cacdac stated that the claimant could not return to a job that required heavy lifting. Claimant testified that his position in Afghanistan was very hard labor and physically demanding. Therefore, I find that the claimant has met his burden in establishing that he cannot return to his regular employment. The employer has offered no evidence to show suitable alternative employment. Therefore, I find that the claimant is totally disabled within the meaning of the Act.

Courts have devised two legal standards to determine whether a disability is permanent or temporary in nature. Under the first test a disability will be considered permanent if, and when, the employee's condition reaches the point of maximum medical improvement (MMI). *James v. Pate Stevedoring Co.*, 22 BRBS 271, 274 (1989); *Phillips v. Marine Concrete Structures*, 21 BRBS 233, 235 (1988); *Trask v. Lockheed Shipbuilding & Constr. Co.,* 17 BRBS 56, 60 (1985). Under the second test a disability will be considered permanent if the employee's impairment has continued for a lengthy period and appears to be of a lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.,* 400 F.2d 649, 654 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969).

Where a treating physician opines that surgery might be necessary in the future and that the claimant should be reevaluated in several months to check for improvement, it is reasonable for an administrative law judge to conclude that the claimant's condition was temporary rather than permanent. *Dorsey v. Cooper Stevedoring Co.*, 18 BRBS 25, 32 (1986). On the other hand, a claimant's disability is permanent if the future surgery is not expected to improve the condition. *Phillips v. Marine Concrete Structures*, 21 BRBS 233, 235 (1988).

The evidence in this case establishes the claimant's disability is temporary in nature. Only one physician that examined the claimant, Dr. Cacdac, opined that the claimant had reached maximum medical improvement. However, Dr. Cacdac also stated that if he had been aware of the claimant's continuing back pain, he would have re-evaluated his opinion. (EX 19, p. 26). Claimant has testified that his back pain has returned, and I therefore accord Dr. Cacdac's opinion little weight because it is not based on an accurate picture of the claimant's condition. Two of the claimant's other physicians, Drs. Kern and Huler, both opined that the claimant needs back surgery. Dr. Kern testified that this surgery is expected to improve the claimant's condition. (CX 8). The medical evidence indicates that surgery is necessary for the claimant, and that this surgery will improve the claimant's condition. Therefore, I find, and the parties concede, that the claimant has not reached a point of maximum medical improvement and that his total disability is temporary. Thus, the claimant is entitled to continuing temporary total disability payments under Section 8(b) of the Act from the date of the work-related accident with the employer.

Average Weekly Wage

Section 10 of the Act sets forth three alternative methods for determining a claimant's average annual earnings, which are then divided by fifty-two, pursuant to Section 10(d), to arrive at an average weekly wage. The first two methods, found in Sections 10(a) and 10(b) of the Act, apply only when the claimant is regularly employed. *Duncanson-Harrelson Co. v. Director, OWCP,* 686 F.2d 1336, 1342 (9th Cir. 1982). When neither of these sections is applicable, Section 10(c) is used.

Section 10(a) focuses on the actual wages earned by the injured worker and is applicable if the claimant has "worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury." 33 U.S.C. § 910(a). Section 10(a) does not apply to this case because claimant did not work substantially the whole of the year for Service Employers International or any other employer in the year preceding his injury.

Where Section 10(a) is inapplicable, the application of Section 10(b) must be explored prior to the application of Section 10(c). 22 U.S.C. § 910(c). Section 10(b) applies to an injured employee who worked in permanent or continuous employment, but did not work for "substantially the whole of the year**"** prior to his injury. *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT) (5th Cir. 1991); *Duncan v. Washington Metro. Area Transit Auth.*, 24 BRBS 133, 136 (1990). Section 10(b) looks to the wages of other workers in the same employment situation and directs that the average weekly wage should be based on the wages of an employee of the same class, who worked substantially the whole year preceding the injury, in

the same or similar employment, in the same or neighboring place. 33 U.S.C. § 910(b). Accordingly, the record must contain evidence of the substitute employee's wages. *Palacios v. Campbell Indus.,* 633 F.2d 840, 12 BRBS 806 (9th Cir**.** 1980). The record does not contain any evidence of a substitute employee's wages. Therefore, Section 10(b) cannot be applied.

Section 10(c) is a general, catch-all provision applicable to cases where the methods at subsections (a) and (b) cannot realistically be applied**.** Theoretically, Section 10(c) should be used in cases when actual earnings during the year preceding the injury do not reasonably and fairly represent the pre-injury wage-earning capacity of the claimant. *Gilliam v. Addison Crane Co.,* 21 BRBS 91, 92-93 (1987). I find this theoretical approach especially pertinent to cases under the Defense Base Act where the wages paid under this statute often are substantially higher in locations such as Afghanistan than in less dangerous areas. I also agree with the claimant's position that some of this employment is not comparable to the same position in the domestic economy because of the dangers, risk and working conditions that exist in areas such as Afghanistan.

A trier-of-fact has broad discretion in determining annual earning capacity under Section 10(c). *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 105 (1991); *Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991). However, the objective of Section 10(c) is to determine a sum that reasonably represents a claimant's annual earning capacity of the time of injury. *Empire United Stevedores v. Gatlin*, 936 F.2d 819 (5th Cir. 1991); *Cummins v. Todd Shipyard*, 12 BRBS 283, 285 (1980). The actual earnings of the claimant are not controlling for purposes of Section 10(c). *National Steel & Shipbuilding v. Bonner*, 600 F.2d 1288, 1292 (9th Cir. 1979). Rather, earning capacity is the amount of earnings that a claimant would have the potential and opportunity to earn absent the injury. *Jackson v. Potomac Temporaries, Inc.*, 12 BRBS 410, 413 (1980).

The parties in this case agree that Section 10(c) is applicable. Their accord stops there as claimant advocates an average weekly wage of $1,533.29 or $79,739.08, a year. While this amount is close to the amount of wages the claimant thought he would earn for a year of work in Afghanistan, I don't understand how claimant's counsel calculated this average weekly wage. Notwithstanding, I find this proposed amount is neither fair nor reasonable. Even if the claimant's total earnings from the employer are divided by the roughly 17 weeks of work for that company, the resulting average weekly wage would be $1,390.47.

The employer maintains its conservative position that the $421.38 average weekly wage calculated by the claims adjuster in determining the compensation rate to be paid the claimant is substantially correct and should be sustained as fair and reasonable. The average weekly wage calculation was based on the $23,637.95 paid to the claimant by the employer under the contract plus the $500.00 the claimant received from other employment in 2004, then divided by 52 weeks.

Section 10(c) has been applied in several claims involving overseas workers. Administrative law judges have relied on a myriad of approaches in an attempt to deal with the fact that overseas employment is generally temporary in nature and may represent a high and temporary "spike" in wages. *See Goldbach v. Service Employers International, Inc.,* 38 BRBS

595; *Fern v. Service Employers International,* 29 BRBS 820 (ALJ 2005); *Stoessell v. Brown & Root, Inc.,* 2002-LHC-649 (ALJ)(Feb. 20, 2003). The brief of employer's counsel contains an excellent discussion of the approaches taken by administrative law judges in many of these cases. Employer places particular emphasis on the "blended approach" taken by the administrative law judge in the *Fern* decision, where the judge used the claimant's last four years of domestic wages, together with his potential annual earnings overseas, then divided the total by 52 weeks to reach the claimant's average weekly wage. This approach somewhat corresponds with the method used by the employer's carrier in calculating the claimant's average weekly wage for compensation purposes. However, I find such an approach is unreasonable in this case because the claimant worked for the employer for only 17 weeks and only earned $500.00 from other employment in the year preceding his injury. I find this blended method of calculating claimant's average weekly wage based on wages paid the claimant by the employer and other employers prior to the injury unfairly distorts or reduces this claimant's earning potential at the time of his injury.

Another approach accepted by administrative law judges in computing average weekly wages in cases of this nature is to simply divide the weeks worked for an employer into the total earnings paid a claimant by that employer. *Neal v. Service Employers International*, *Inc.*, 2005-LDA-54 (ALJ) (Feb. 16, 2006) (unpub.); *Zimmerman v. Service Employers International*, *Inc.,* 39 BRBS 166 (ALJ) (Mar. 25, 2005). However, I find this approach is too speculative in this case. The amount of wages earned by this claimant during the 17 weeks was in excess of the provisions of the contract because he essentially worked twelve hours a day for seven days a week. Obviously, the claimant could not have maintained such a rigorous schedule over the entire year, given the physically demanding duties. Moreover, he was required to take six weeks of interim leave (R&R) during his year of employment which would have reduced his pay substantially during that time. I therefore look for another manner to resolve this issue.

I reiterate that the employment agreement between the claimant and the employer provided for a base monthly salary of $2,583.00, plus an additional 55% of that amount for foreign service bonus, area differential and danger pay. Counsel for the claimant and employer/carrier contend the wages to be paid under the contract were $4,003.65 per month, or $48,043.80 per year. This results in an average weekly wage under the contract of $923.92, based on dividing the yearly wages and uplifts by 52 weeks. However, their calculation fails to take into consideration that the claimant also was required to take six weeks of interim leave (R&R) during the year and was to be paid straight time or $2,583.00 per month during that time. I calculate the interim leave pay would reduce the claimant's average weekly wage during those six weeks from $923.92 to $596.08 or $327.84 per week[3]. This reduction in the average weekly wage for the six weeks of interim leave pay reduces the claimant's total wages under the contract by $1,967.04 to $46,076.76.

Calculating a claimant's average weekly wage under the terms of a contract normally could be a reasonable way to resolve this issue if the actual weekly wages paid the employee prior to an injury approximates the minimum weekly wages required under the contract. Unfortunately, that is not the situation involved in this case. The wages paid this claimant were

[3] Monthly base pay of $2,583.00 multiplied by 12 months ($30,996.00) divided by 52 weeks ($596.08).

based on working 12 hours per day, 7 days per week, for almost 17 weeks. Thus, his actual paid wages exceeded the wages provided in the contract.

I too am going to take a "blended approach" in resolving the average weekly wage issue in this case. However, rather than looking back at pre-injury wages, I am going to look forward to the claimant's potential post-injury wage earning capacity for a full year of work for this employer. To calculate the claimant's potential earnings for 52 weeks, I first take the total wages paid the claimant by the employer for his almost 17 weeks of work, totaling $23,637.26. I next add to this sum $32,337.20, which represents the claimant's average weekly wage under the contract for wages and uplifts for the remaining 35 weeks of the year. From this sum of $55,974.46, I finally subtract $1,967.04 which equals the amount of uplifts the claimant would not have received under the contract for his six weeks of interim leave. This results in the claimant's potential minimum earnings for a year of work with the employer, absent the injury, totaling $54,007.42. Dividing this sum by 52 weeks, as required by Section 10(d), I calculate the claimant's average weekly wage to be $1,038.60 for purposes of this case.

In conclusion, I find the claimant's average weekly wage for purposes of this case should be computed under Section 10(c) of the Act. I further find that the average weekly wage proposed by the claimant is excessive and that proposed by the employer/carrier is conservative. I conclude that the average weekly wage for purposes of this case should be calculated using the claimant's actual wages from this employer prior to the injury and his minimum wage earning capacity under the contract after the injury. I reiterate that this results in an average weekly wage of $1,038.60. The resulting compensation rate under Section 8(b) of the Act is $692.40.

Medical Benefits

Section 7(a) of the Act provides "[t]he employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a). In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. *See* 20 C.F.R. § 702.402. Therefore, a judge may reject payment for unnecessary treatment. *Ballesteros v. Willamette Western Corp.,* 20 BRBS 184, 187 (1988); *Turner v. Chesapeake & Potomac Tel. Co.,* 16 BRBS 255 (1984); *Scott v. C & C Lumber Co.,* 9 BRBS 815 (1978).

A claimant has established a *prima facie* case for compensable medical treatment when a qualified physician indicates treatment was necessary for a work-related condition. *Turner*, 16 BRBS at 257-58. A judge has no authority to deny a medical expense on the ground that a physician's expertise, customary fees, or result of treatment were not documented. *Id*. at 257. Employer is only liable, however, for the reasonable value of medical services. *See* 20 C.F.R. § 702.413. The judge is required to make specific findings of fact regarding an employer's claim that a particular expense is non-compensable. *Monrote v. Britton*, 237 F.2d 756 (D.C. Cir. 1956). The employer bears the burden of showing by substantial evidence that the proposed treatment is neither reasonable nor necessary. *Salusky v. Army Air Force Exchange Service,* 16 BRBS 228 (1984).

Claimant argues that he should be allowed to have surgery on his back because his injury occurred during the course of his employment. I agree with this position and find that the back surgery is both reasonable and necessary. Drs. Huler and Kern both opined that surgery is needed. Although Dr. Cacdac did not state that he recommended surgery, he did testify that he had no knowledge of the claimant's continuing back pain. Dr. Blair is the only physician that opined that the surgery was not necessary. This physician did not have the opportunity to evaluate the claimant and I give his opinion less weight than those of the other physicians. I therefore conclude that the employer has not shown by substantial evidence that the proposed treatment is unreasonable or unnecessary. Claimant is entitled to the payment or reimbursement of all reasonable and necessary medical expenses, including the back surgery, relating to the January 28, 2005 injury that occurred while claimant was employed for Service Employers International, Inc.

Interest

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp*., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. *Newport News v. Director, OWCP,* 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "...the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *See Grant v. Portland Stevedoring Company, et al*., 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Attorney Fees

No award of attorney's fees for services to the claimant is made herein since no application for fees has been made by the claimant's counsel. Counsel is hereby allowed thirty days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the claimant, must accompany the petition. Parties have thirty days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

ORDER

Based on the above findings of fact and conclusions of law, IT IS HEREBY ORDED that claimant is entitled to the following as a result of the claim involved in this proceeding:

(1) commencing January 28, 2005 and continuing, employer/carrier shall pay to claimant compensation for temporary total disability under Section 8(b) of the Act of $692.40 per week based on an average weekly wage of $1,038.60;

(2) employer/carrier shall continue to be responsible for all reasonable and necessary Section 7 medical expenses related to claimant's injury of January 28, 2005, including his back surgery;

(3) employer/carrier shall pay interest on all of the above sums determined to be in arrears as of the date of service of this Order at the rate applicable under 28 U.S.C. § 1961; and,

(4) employer/carrier are entitled to credit for any disability payments already paid to claimant under the Act.

The specific computations of the award and interest shall be administratively performed by the district director.

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DONALD W. MOSSER
Administrative Law Judge